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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 397.

A. J. SELVESTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED JUNE 14, 1897.

(16,610.)

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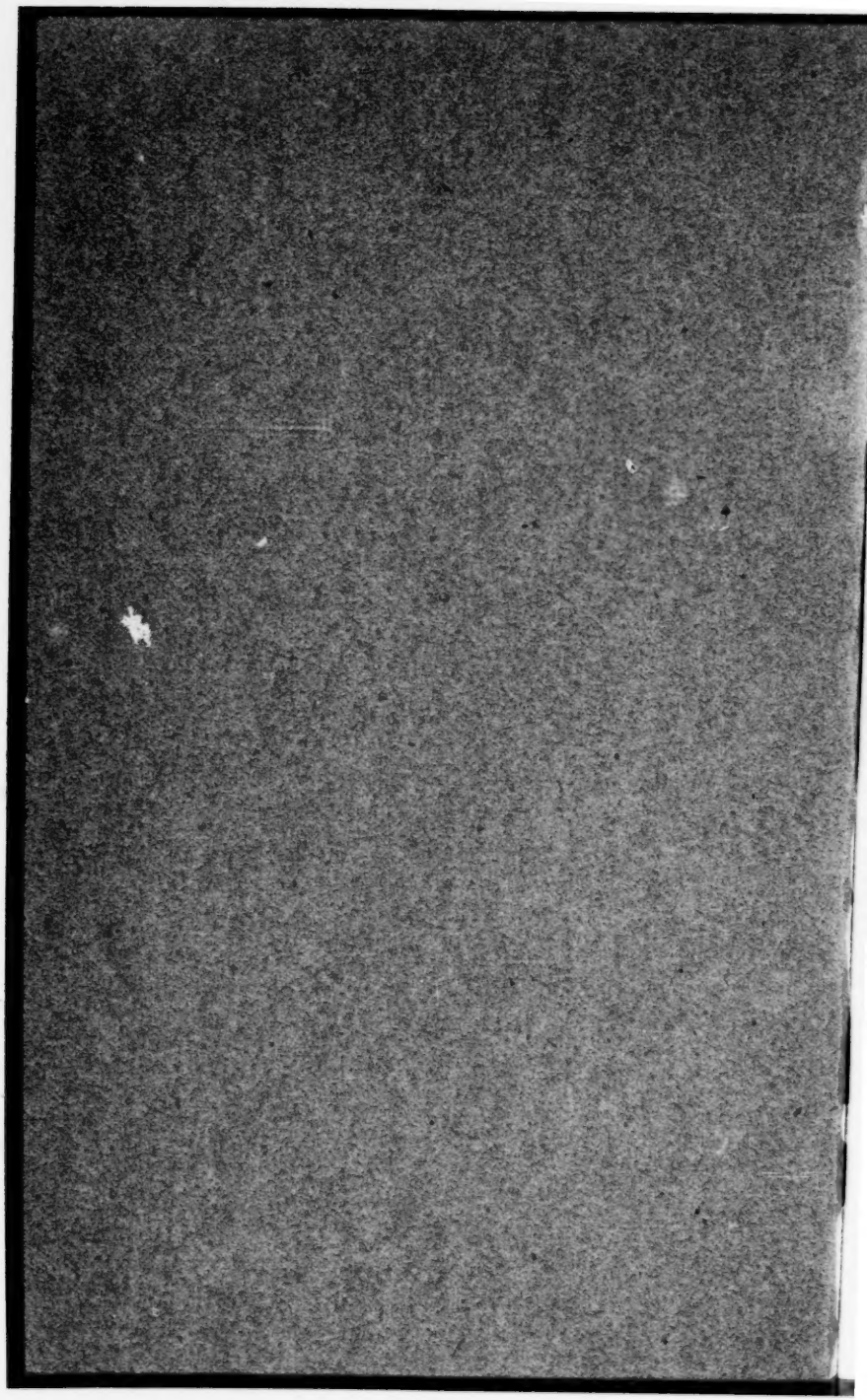

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1897.

1 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,
vs.
A. J. SELVESTER, Defendant and Plaintiff in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States of America for the northern district of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court of the United States for the northern district of California, before the Honorable W. W. Morrow, district judge, between The United States, plaintiff and defendant in error, and A. J. Selvester, defendant and plaintiff in error, as by complaint doth appear, *and* being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme
2 Court of the United States of America, together with this writ, so that you have the same at Washington on the second Monday in October, A. D. 1896, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid be then and there inspected, and that the Supreme Court cause to be further done therein to correct that error that of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of July, A. D. 1896.

SOUTHARD HOFFMAN,
Clerk of the District Court of the United States for the Northern District of California.

3 [Endorsed:] No. —. Dep't —. Supreme Court of the United States. The United States, plaintiff and defendant in error, *vs.* A. J. Selvester, defendant and plaintiff in error. Writ of error. Receipt of copy of within — admitted this — day of ——, 189–. ——— ———, attorney for ——— ———. Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk. Geo. E. Colwell, attorney for pl'ff in error, Napa, Cal.

4 (*Return to Writ of Error.*)

The answer of the judge of the district court of the United States for the northern district of California.

The record and proceeding of the plaint whereof mention is within made, with all things touching the same, we certify under the seal

of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal of the U. S. District Court, Northern Dist. of California.]

SOUTHARD HOFFMAN,
Clerk U. S. District Court, Northern District of California.

5 In the District Court of the United States for the Northern District of California.

At a stated term of said court begun and holden at the city and county of San Francisco, State of California, within and for the northern district of California, on the second Monday in July, in the year of our Lord one thousand eight hundred and ninety-four.

The grand jurors of the United States of America within and for the district aforesaid on their oath present that James Selvester, later of the northern district of California, heretofore, to wit, on the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-three, at Bieber, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent then and there to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, have in his, the said James Selvester's, possession the following three pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half-dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States before the said James Selvester had the said three pieces of false, forged,

6 and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, he, the said James Selvester, then and there, to wit, at the time and place that he, the said James Selvester, had the said pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, well knowing the said pieces of false, forged, and counterfeit coins of metal to be false, forged, and counterfeit, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

And the grand jurors aforesaid on their oath aforesaid do further present that James Selvester, later of the northern district of California, heretofore, to wit, on the twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, at Pittville, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this

honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent to defraud one Ruben Baker, pass, utter, publish, and sell as true to the said Ruben Baker the following two certain pieces of false, forged, and counterfeit coins of metal, to wit, two pieces of false, forged, and counterfeit coins of metal, each one of which said two pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half-dollar or
fifty-cent piece, which had been coined and stamped at a mint
7 of the United States before the said James Selvester had the
said two pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, he, the said James Selvester, then and there, to wit, at the time and place that he, the said James Selvester, had the said two pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, well knowing the said two pieces of false, forged, and counterfeit coins of metal to be false, forged, and counterfeit, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

Third Count.

And the grand jurors aforesaid on their oath aforesaid do further present that James Selvester, late of the northern district of California, heretofore, to wit, on the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-three, at Bieber, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and this honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent to defraud one Wolf Rudee, pass, utter, publish, and sell as true to the said Wolf Rudee the following three certain pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said three pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance
and *d*imilitude of a silver coin of the United States of America
8 of the denomination known as and called a half-dollar or fifty-
cent piece, which had been coined and stamped at a mint of the United States before the said James Selvester had the said three pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, he, the said James Selvester, then and there, to wit, at the time and place that he, the said James Selvester, had the said three pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Selvester's, possession, as aforesaid, well knowing the said three pieces of false, forged, and counterfeit coins of metal to be false, forged, and counterfeit, against the peace and dignity of the United States of America and contrary to the form of

the statute of the said United States of America in such case made and provided.

Fourth Count.

And the grand jurors aforesaid on their oath aforesaid do further present that James Selvester, late of the northern district of California, heretofore, to wit, on the twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, and at divers other days and times between the said twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, and the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-three, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this honorable court then and there being, did then and there feloniously, knowingly,
9 and unlawfully falsely make, forge, and counterfeit five certain pieces of metal in the resemblance and similitude of silver coins of the United States called half-dollars or fifty-cent pieces, which had been coined at a mint of the United States before the said James Selvester had so falsely made, forged, and counterfeited the said coins, as aforesaid, with intent to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

CHAS. A. GARTER,
United States Attorney.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: N. R. Harris, C. B. McCoy, R. Baker, Wolf Rudee.

(Endorsed:) A true bill. Judson Wheeler, foreman. Presented and filed in open court this 26th day of October, A. D. 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

10 UNITED STATES OF AMERICA, }
Northern District of California, } *ss.:*

To the marshal of the United States of America for the district of California and his deputies or any or either of them, Greeting:

Whereas at a district court of the United States of America for the district of California, begun and held at the city and
[SEAL.] county of San Francisco, within and for the district aforesaid, on the 26th day of Oct., in the year of our Lord one thousand eight hundred and ninety-four, the grand jurors in and for the said district brought into the said court a true bill of indictment against James Selvester for having false, &c., coins in his possession, passing same on Ruben Baker, &c., and for falsely making coins of metal, &c., in Shasta Co., Cal., &c., as by the said indictment now remaining on file and of record in said court will more fully

appear; to which indictment the said James Selvester has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America to apprehend the said James Selvester and him bring before the said court at the United States district court room, in the city and county of San Francisco, to answer the information aforesaid.

Witness the Hon. Wm. W. Morrow, judge of the said district court, and the seal thereof, at the city and county of San Francisco, the 26th day of Oct., A. D. 1894.

Attest: SOUTHARD HOFFMAN, *Clerk*,
By —— ——, *Deputy Clerk*.

Chas. A. Garter, Esq., U. S. attorney.

[Endorsed:] No. 3073. United States district court, northern district of California. The United States of America *vs.* James Selvester. Bench warrant. Bail fixed at $2,500. Chas. A. Garter, U. S. attorney.

(Endorsed:) Filed October 30th, 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

UNITED STATES OF AMERICA,
Northern District of California.

MARSHAL'S OFFICE.

In obedience to the warrant, I have the body of the said James Silvester before the honorable the district court of the United States in and for the northern district of California this 30 day of October, A. D. 1894.

BARRY BALDWIN,
U. S. Marshal,
By M. C. HARRIS,
Deputy U. S. Marshal.

11 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Tuesday, the 30th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES SELVESTER. } No. 3073.

In this case the defendant being produced in open court in obedience to a bench warrant issued herein, on motion of Samuel Knight, Esq., assistant U. S. attorney, and in default of bail, it is ordered that the defendant be committed to the custody of the U. S. marshal.

12 UNITED STATES OF AMERICA, } ss:
Northern District of California, }

The President of the United States to the marshal of the United States for the northern district of California, Greeting:

Whereas at the July, 1894, term of the district court of the United States of America for the northern district of California, held at the court-room of said court, in the city and county of San Francisco, in said district, to wit, on the 30 day of Oct., A. D. 1894, the United States marshal for the northern district of California produced the body of James Selvester in open court, in obedience to the provisions of a bench warrant heretofore issued for his arrest upon the charge of having false, &c., coins in his possession, passing same, &c., & for falsely making coins, &c.;

And whereas, said James Selvester having been duly arraigned upon said charge and having pleaded not guilty, it was by the court ordered that in default of bail, heretofore fixed in the sum of $2,500, the said James Selvester be committed to the custody of the United States marshal for the northern district of California to await trial:

Now, this is to command you, the said marshal, to take and keep the said James Selvester in your custody to await his trial or until the other or further order of this court.

Herein fail not.

Witness the Hon. Wm. W. Morrow, judge of the district court of the United States for the northern district of California, and the seal thereof, at San Francisco, in said district, on the 30 day of Oct., A. D. 1894.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of said District Court,
By —— ——, *Deputy Clerk.*

[Endorsed:] No. 3073. In the district court of the United States, northern district of California. The United States *vs.* James Selvester. Mittimus.

(Endorsed:) Issued Oct. 30th, 1894. Filed this 2d day of Nov., 1894. Southard Hoffman, clerk, by —— ——, deputy clerk.

The within mittimus was received by me on the 30 day of October, 1894, and is returned executed this 30th day of October, 1894, by placing said James Selvester in the Alameda County jail on said day.

BARRY BALDWIN,
U. S. Marshal,
By J. O. LITTLEFIELD, *Deputy.*

13 UNITED STATES OF AMERICA, } ss:
Northern District of California, }

Be it remembered that on this 12th day of November, in the year of our Lord one thousand eight hundred and ninety-four, before the undersigned, a commissioner duly appointed by the circuit court of the United States for the northern district of California to

take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States pursuant to the acts of Congress in that behalf, personally appeared James Selvester, as principal, and W. C. Selvester, J. V. Selvester, T. H. Vestal, John W. Rogers, Isaacs N. Vestal, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of twenty-five hundred ($2,500) dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such that whereas an indictment has been found by the grand jury of the United States for the northern district of California, and filed on the 26th day of Oct'r, A. D. 1894, in the district court of the United States for said northern district of California, charging the said James Selvester with having false, &c., coins in his possession, passing same on Ruben Baker, &c., & for falsely making coins of metal, &c., in Shasta Co., Cal., committed on or about the 5th day of December, A. D. 1893, to wit, at the district aforesaid, contrary to the form of the statute of the United States in such case made and provided.

And whereas the said James Selvester has been required to give a recognizance, with sureties, in the sum of twenty-five hundred ($2,500) dollars for his appearance:

Now, therefore, if the said James Selvester shall personally appear at the district court of the United States for the northern district of California, to be holden at the court-room of said court, in the city of San Francisco, on the 26th day of November, A. D. 1894, at eleven o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise to remain in full effect and virtue.

JAMES SELVESTER. [SEAL.]
W. C. SELVESTER. [SEAL.]
J. V. SELVESTER. [SEAL.]
T. H. VESTAL. [SEAL.]
JOHN W. ROGERS. [SEAL.]
ISAAC N. VESTAL. [SEAL.]

Acknowledged before me the day and year first above written by James Selvester.

SOUTHARD HOFFMAN,
Comss. U. S Crt. Ct., N. D. Cal.

Comm'r U. S. circuit court, northern district of California, to take acknowledgments of bail, etc.

STATE AND NORTHERN DISTRICT OF CALIFORNIA, *ss:*

T. H. Vestal, John Robers, and Isaac N. Vestal appeared before me and acknowledged the execution of the foregoing bond this 12th day of November, 1894.

[SEAL.]

A. A. BAKER,
Notary Public in and for Shasta Co., State of Cal.

STATE AND NORTHERN DISTRICT OF CALIFORNIA, *ss:*

W. S. Selvester and John V. Selvester appeared before me and acknowledged the execution of the foregoing bond this 12th day of November, 1894.

[SEAL.]

I. H. WINTER,
Notary Public in and for Shasta County, State of California.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

F. H. Vestal, John W. Rogers, and Isaac N. Vestal, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred ($500.00) and $\frac{00}{100}$ dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

F. H. VESTAL.
JOHN W. ROGERS.
ISAAC N. VESTAL.

Subscribed and sworn to before me this 12th day of November, 1894.

[SEAL.]

A. A. BAKER,
Notary Public in and for Shasta County, State of California.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

W. C. Selvester and John V. Selvester, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of fifteen hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

W. C. SELVESTER.
J. V. SELVESTER.

Subscribed and sworn to before me this 12th day of November, 1894.

[SEAL.]

I. H. WINTER,
Notary Public in and for Shasta County, State of California.

——— ———, ——— ———, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of — dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

——— ———.
——— ———.

Subscribed and sworn to before me this — day of ——, A. D. 189–.

——— ———,

Comm'r U. S. Circuit Court, Northern District of California, to Take Acknowledgements of Bail, etc.

The form of the foregoing bond and the sufficiency of the sureties thereto is hereby approved.

CHAS. A. GARTER,
U. S. Attorney.

REDDING, CAL., *Nov.* 16, 1894.

I hereby certify that I would accept and approve the within bond, in so far as the sureties are concerned, in a matter of like nature pending before me.

EDWARD SWEENEY,
Judge Superior Court, Shasta Co., Cal.

[Endorsed:] No. 3073. U. S. district court, northern district of California. The United States of America *vs.* James Selvester. Bond to appear in the sum of $—, with ——— ——— and ——— ——— as sureties.

(Endorsed:) Filed Nov'r 20th, 1894. Southard Hoffman, clerk. J. S. Manley, deputy clerk.

14 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Monday, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES SELVESTER. } No. 3073.

In this case, the defendant being present in open court, with Geo. E. Colwell, Esq., his attorney, by order of the court, on motion of Bert Schlesinger, Esq., assistant U. S. attorney, the defendant was duly arraigned upon the indictment on file herein against him, and to which indictment he then and there pleaded not guilty.

On motion of Mr. Schlesinger, it is ordered that the trial hereof do now proceed; and thereupon the following-named persons were duly impaneled, accepted, and sworn as the jury to try this case, to wit, John D. Vaull, Frank E. Dietz, Samuel M. Capp, L. H. Clement, James McHaffie, Robert Murray, E. W. Newhall, P. J. White, Geo. E. Wheaton, Thomas A. Fisher, S. B. Cushing, and A. H. Hills.

The reading of the indictment being waived, Mr. Schlesinger stated the case on behalf of the United States to the court and jury, and called Wolf Rudee, Rheuben Baker, Frank McArthur, Chas.

B. McCoy, George Rogers, & N. R. Harris, Jr., who were duly sworn and examined as witnesses on behalf of the United States, and rested. Mr. Colwell stated the case on behalf of the defendant to the court and jury, and called James Selvester, J. F. Morrison, J. T. Burton, T. H. Vestal, C. E. Mayfield, Michael Kuney, C. A. Burton, J. C. Brown, W. C. Selvester, J. R. Creighton, C. Penrose, J. Killebrew, J. W. Zumwalt, M. O. Moores, W. H. Hollenbeck, G. A. Fine, and H. W. Caster, who were duly sworn and examined as witnesses on behalf of the defendant; and thereupon the further trial hereof was continued until Tuesday, May 19th, 1896.

15 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Tuesday, the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES SELVESTER. } No. 3073.

In this case the defendant, with Geo. E. Colwell, Esq., his attorney, Bert Schlesinger, Esq., assistant U. S. attorney, and the jury sworn to try this cause being present in open court, the trial hereof was resumed. Mr. Colwell called A. A. Baker, who was duly sworn and examined as a witness on behalf of the defendant, and rested.

Mr. Schlesinger, by consent of Mr. Colwell and with the permission of the court, called W. A. Nichols, who was duly sworn and examined as a witness on behalf of the United States, and rested.

The case was then argued by Mr. Schlesinger and Mr. Colwell, and submitted. The court charged the jury, who at 12.34 p. m. retired to deliberate upon a verdict. By the court ordered that the marshal furnish meals to the jurors engaged in the trial of this case. Subsequently, at 2.42 p. m., the jury returned into court and asked for and received further instructions; and again retired, and at 3.45 p. m. returned into court and asked for and received further instructions; and without retiring, upon being asked if they had agreed upon a verdict, rendered a written verdict and said, "We, the jury, find James Selvester, the prisoner at the bar, guilty on the 1st, 2nd, and 3rd counts of the indictment and disagree on the 4th count of the indictment;" and so said they all. On motion of Mr. Schlesinger, it is ordered that the defendant be committed to the custody of the U. S. marshal to await sentence; and further ordered that the prisoner be produced in court on Monday, May 25th, 1896, at 11 o'clock a. m., for sentence.

16 In the District Court of the United States, Northern District of California.

THE UNITED STATES
vs.
JAMES SELVESTER. } No. 3073.

We, the jury, find James Selvester, the prisoner at the bar, guilty on the 1st, 2nd, & 3rd counts of the indictment and disagree on the 4th count of the indictment.

E. W. NEWHALL, *Foreman.*

(Endorsed:) Filed May 19th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

17 UNITED STATES OF AMERICA, } ss:
Northern District of California, }

The President of the United States to the marshal of the United States for the northern district of California, Greeting:

Whereas, at the July (1894) term of the district court of the United States of America for the northern district of California, held at the court-room of said court, in the city and county of San Francisco, in said district, to wit, on the 30 day of Oct., A. D. 1894, the United States marshal for the northern district of California produced the body of Jas. Selvester in open court in obedience to the provisions of a bench warrant heretofore issued for his arrest upon the charge of possession & passing false, &c., coins, &c.;

And whereas, said Jas. Selvester having been duly arraigned upon said charge, and having pleaded not guilty, & having been duly tried & convicted, it was by the court ordered that the said Jas. Selvester be committed to the custody of the United States marshal for the northern district of California to await sentence*d:*

Now, this is to command you, the said marshal, to take and keep the said Jas. Selvester in your custody to await his sentence or until the other or further order of this court.

Herein fail not.

Witness the Hon. Wm. W. Morrow, judge of the district court of the United States for the northern district of California, and the seal thereof, at San Francisco, in said district, on the 19th day of May, A. D. 1896.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk of said District Court,
By —— ——, *Deputy Clerk.*

[Endorsed:] No. 3073. In the district court of the United States, northern district of California. The United States *vs.* Jas. Selvester. Mittimus.

(Endorsed:) Issued May 19th, 1896. Filed this 21st day of May, 1896. Southard Hoffman, clerk, by —— ——, deputy clerk.

The within mittimus was received by me on the 19th day of May, 1896, and is returned executed this 19th day of May, 1896.

BARRY BALDWIN,
U. S. Marshal,
By S. P. MONCKTON, *Deputy.*

18 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Monday, the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES SELVESTER. } No. 3073.

In this case, the prisoner being present in open court with Geo. E. Colwell, Esq., his attorney, on motion of H. S. Foote, Esq., U. S. attorney, the prisoner was called for sentence. Mr. Colwell then moved the court in arrest of judgment on the ground that the verdict is incomplete, and by the court ordered that said motion be, and the same is hereby, denied, and to which order denying said motion the prisoner, by his counsel, then and there duly excepted.

Mr. Colwell then moved the court to set aside the verdict on the ground that said verdict is incomplete, and by the court ordered that said motion be, and the same is hereby, denied, and to which order denying said motion the prisoner, by his counsel, then and there duly excepted. Mr. Colwell then moved for a new trial herein, and by the court ordered that said motion be, and the same is hereby, denied, and to which order denying said motion the defendant, by his counsel, then and there duly excepted.

And the prisoner *upon* being asked if he had anything to say why sentence should not be pronounced upon him according to law, and nothing appearing why sentence should not be pronounced, it is by the court now here ordered and adjudged that the said James Selvester, for the crime of which he stands convicted, be, and he is hereby, sentenced to pay a fine of $1,000.00 and to be imprisoned for the term of ten (10) years at hard labor, and in default of the payment of said fine of $1,000.00 that he be further imprisoned until said fine be paid or until he be otherwise discharged by due process of law; and further ordered and adjudged that said judgment of imprisonment be executed upon the said James Selvester, until the other or further order of the court, by imprisonment in the State prison of the State of California, at Folsom, California.

19 In the District Court of the United States for the Northern District of California.

THE UNITED STATES, Plaintiff,
vs.
A. J. SYLVESTER, Defendant.

Be it remembered, this cause coming on regularly for trial on Monday, the 18th day of May, 1896, the defendant having been theretofore arraigned and pleaded not guilty to all and the several counts of the indictment herein, Bert Schlesinger, Esq., assistant United States attorney for said district, appearing on the behalf of the United States, and Geo. E. Colwell appearing on behalf of the defendant, and the jury having been regularly impanelled, the United States, to maintain the issues on their part, introduced evidence in proof of all and the several counts of the indictment; which said indictment is as follows:

In the District Court of the United States for the Northern District of California.

At a stated term of said court begun and holden at the city and county of San Francisco, State of California, within and for the northern district of California, on the second Monday in July, in the year of our Lord one thousand eight hundred and ninety-four.

The grand jurors of the United States of America within and for the district aforesaid on their — present that James Sylvester, later of the northern district of California, heretofore, to wit, on the fifth day of December, in the year of our Lord one thousand eight hun-
20 dred and ninety-three, at Bieber, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent then and there to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, have in his, the said James Sylvester's, possession the following three pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half-dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States before the said James Sylvester had the said three pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Sylvester's, possession, as aforesaid, he, the said James Sylvester, then and there, to wit, at the time and place he, the said James Sylvester, had the said pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Sylvester's, possession, as aforesaid, well knowing the said pieces of false, forged, and counterfeit coins of metal to be false,

forged, and counterfeit, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

21 And the grand jurors aforesaid on their oath aforesaid do further present that James Sylvester, late of the northern district of California, heretofore, to wit, on the twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, at Pittville, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent to defraud one Ruben Baker, pass, utter, publish, and sell as true to the said Ruben Baker the following two certain pieces of false, forged, and counterfeit coins of metal, to wit, two pieces of false, forged, and counterfeit coins of metal, each one of which said two pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half-dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States before the said James Sylvester had the said two pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Sylvester's, possession, as aforesaid, he, the said James Sylvester, then and there, to wit, at the time and place that he, the said James Sylvester, had the said two pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Sylvester's, possession, as aforesaid, well knowing the said two pieces of false, forged, and counterfeit coins of metal to be false, forged, and counterfeit, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

22 *Third Count.*

And the grand jurors on their oath aforesaid further present that James Selvester, late of the northern district of California, heretofore, to wit, on the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-three, at Bieber, in the county of Shasta, State and northern district of California, and within the jurisdiction of this honorable court then and there being, did then and there unlawfully, wilfully, knowingly, and feloniously, and with intent to defraud one Wolf Rudee, pass, utter, and publish, and sell as true to the said Wolf Rudee the following three certain pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said three pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half-dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States before the said James Sylvester had the said three pieces of false, forged, and counterfeit coins of metal here-

inbefore described in his, the said James Sylvester's, possession, as aforesaid, he, the said James Sylvester, then and there, to wit, at the time and place that he, the said James Sylvester, had the said three pieces of false, forged, and counterfeit coins of metal hereinbefore described in his, the said James Sylvester's, possession, as aforesaid, well knowing the said three pieces of false, forged, and counterfeit coins of metal to be false, forged, and counterfeit.

Fourth Count.

23 And the grand jurors aforesaid on their oath aforesaid do further present that James Sylvester, late of the northern district of California, heretofore, to wit, on the twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, and at divers other days and times between the said twelfth day of November, in the year of our Lord one thousand eight hundred and ninety-three, and the fifth day of December, in the year of our Lord one thousand eight hundred and ninety-three, in the county of Shasta, State and northern district of California, and within the jurisdiction of the United States and of this honorable court then and there being, did then and there feloniously, knowingly, and unlawfully falsely make, forge, and counterfeit five certain pieces of metal in the resemblance and similitude of silver coins of the United States called half-dollars or fifty-cent pieces, which had been coined at a mint of the United States before the said James Sylvester had so falsely made, forged, and counterfeited the said coins, as aforesaid, with intent to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

CHAS. A. GARTER,
United States Attorney.

Names of witnesses examined before the grand jury on finding the foregoing indictment: N. R. Harris, C. B. McCoy, R. Baker, Wolf Rudee.

(Endorsed:) A true bill. Judson Wheeler, foreman. Presented and filed in open court this 26th day of October, A. D. 1894. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

24 Arraigned May 18th, 1896, and pleads not guilty.
Tried May 18, 19, 1896.

Verdict, guilty on 1st, 2nd, 3rd counts and disagrees as to the 4th count.

June 1st, 1896.

Sentenced to pay a fine of $1,000 and to be imprisoned at hard labor for 10 yrs. at Folsom, and in default of fine to be further imprisoned until paid.

And the defendant, in support of the issues on his part, introduced evidence in support of his plea of not guilty of each and all

of the counts of said indictment, and thereafter the court instructed the jury and they retired to their jury-room, and thereafter came into court and announced that they were unable to agree, but stated that they agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the court if they could return such a verdict. The court informed them they could, and the district attorney then asked leave of the court to enter a *nolle prosequi* as to the fourth count; to which motion the counsel for the defendant objected, and upon such objection the district attorney withdrew his said motion, and the jury then, without retiring, drew up and signed the following as their verdict: "We, the jury, find the defendant guilty on the first, second, and third counts and disagree as to the fourth count;" that, over defendant's objection and exception, the court received said verdict and caused the same to be recorded, and the jury were then discharged; that thereafter, upon the discharge of the jury, the defendant gave notice in open court that he would move for arrest of judgment and for a new trial on Monday, the first day of June, 1896.

25 That on the first day of June, 1896, the defendant moved the said district court for an arrest of judgment on the ground that the said verdict was no verdict in law and was insufficient, incomplete, and uncertain. The motion was denied by the court; to — ruling the defendant then and there excepted and now assigns the same as error.

The defendant then moved the court for an order setting aside the said verdict on the ground that the same was incomplete, uncertain, insufficient, and in law no verdict. Said motion was by the court denied; to which ruling the defendant then and there excepted and now assigns the same as error.

The defendant then moved the court for a new trial on the ground that the verdict, as herein declared, was uncertain, incomplete, insufficient, and in law no verdict, and on the further ground that the court erred in receiving said pretended verdict as a legal verdict. The court denied said motion; to which ruling the defendant then and there excepted and now assigns the same as error. The court thereafter sentenced the defendant to be imprisoned in the State prison of California, situated at Folsom, for the period of ten years and to pay a fine of $1,000.

And forasmuch as the foregoing facts do not appear fully of record the defendant prays that this his bill of exceptions may be signed and sealed and made a part of the record; which is accordingly done.

WM. W. MORROW,
District Judge.

Dated San Francisco, Cal., July 8th, 1896.

(Endorsed:) Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

26 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,
vs.
A. J. SELVESTER, Defendant and Plaintiff in Error.

The said A. J. Selvester feeling himself aggrieved by the verdict of the jury and the judgment entered by the court on the first day of June, 1896, in pursuance of such verdict, whereby it was ordered, adjudged, and decreed that the defendant be imprisoned in the State prison, at Folsom, for the period of ten years and pay a fine of one thousand (1,000) dollars—

Comes now A. J. Selvester, by Geo. E. Colwell, his attorney, and respectfully petitions this honorable court for an order allowing this defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and that on the allowance of said writ of error all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

Said defendant herewith files his bill of exceptions herein, together with his specifications and assignments of error; to which bill of specifications and assignments of error reference is hereby specially made for the purpose of this application.

Reference is also made to the entire record of the case at
27 the date of this application on file herein.

Respectfully submitted.

GEO. W. COLWELL,
Attorney for said Defendant.

San Francisco, June 25, 1896.

(Endorsed:) Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

28 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,
vs.
A. J. SELVESTER, Defendant and Plaintiff in Error.

Now comes the above-named defendant and particularly specifies the following as errors upon which he will rely and which he will urge upon his writ of error in the above-entitled cause:

1. That the court erred in denying defendant's motion for arrest of judgment herein.

2. That the court erred in denying defendant's motion to set aside the verdict rendered herein.

3. That the court erred in denying defendant's motion for a new trial.

4. That the court erred in proceeding to sentence upon the verdict rendered herein.

In order that the foregoing assignments of error may be and appear of record, the plaintiff in error presents the same to the court and prays that said disposition may be made thereof in accordance with the law and the statutes of the United States in such case made and provided, and prays an order that the judgment of the United States district court in and for the northern district of California be reversed and set aside, and that he be granted a new trial, and that he be dismissed and discharged from said indictment in said cause.

San Francisco, July 8th, 1896.

GEO. E. COLWELL,
Attorney for Defendant and Pl'ff in Error.

(Endorsed:) Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

29 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error, *vs.* A. J. SELVESTER, Defendant and Plaintiff in Error.	Order Allowing Writ of Error and Directing Clerk to Issue the Same.

Upon reading and filing the petition of A. J. Selvester, said defendant, from the judgment entered by this court on June 1st, 1896, whereby it was decreed that defendant be imprisoned at the State prison, at Folsom, for the term of ten years and pay a fine of one thousand (1,000) dollars, that he be allowed to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and good cause appearing for the granting of said petition—

It is hereby ordered that said defendant be permitted to so prosecute said writ of error in the said Supreme Court of the United States.

And, further, that the clerk of this court do forthwith issue said writ in said behalf.

WM. W. MORROW,
District Judge of the United States District Court in and for the Northern District of California.

San Francisco, Calif., July 8th, 1896.

(Endorsed:) Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

30 In the District Court of the United States of America, Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,
vs.
A. J. SELVESTER, Defendant and Plaintiff in Error.

On writ of error to the United States district court for the northern district of California from a conviction of defendant for passing and coining counterfeit coin.

To the Honorable W. W. Morrow, judge of the United States district court, northern district of California:

The petition of A. J. Selvester, the said defendant and now plaintiff in error, respectfully showeth unto your honor—

That on or about the 26th day of October, A. D. 1894, your petitioner was indicted by the grand jury within and for the northern district of California upon indictment in four counts, and was thereupon arrested and held to bail in the sum of two thousand five hundred (2,500) dollars; which bail petitioner duly gave and was thereupon released pending trial.

That said indictment was framed in four counts. The first count alleges that defendant had in his possession three pieces of false, forged, and counterfeit coins of metal in the resemblance and similitude of silver coins of the United States, well knowing that said pieces were false, forged, and counterfeit coins.

That the second and third counts of said indictment allege that the said defendant passed upon different parties certain
31 false, forged, and counterfeit coins of money; that the fourth count of said indictment charged that the said defendant did feloniously, knowingly, and unlawfully make, forge, and counterfeit five pieces of metal in the resemblance and similitude of coins of the United States called half-dollars.

That defendant pleaded not guilty to each and all of the counts of said indictment, and thereafter, on the 18th day of May, 1896, after a trial before a jury, and that after the cause had been submitted to the jury and they had retired to their room, they, after several hours of deliberation, returned into the court and announced that they were unable to agree, and asked the court if they could agree to some of the counts of the indictments and disagree as to the residue. The court informed them that they could, and without retiring the jury then reported the following verdict:

We, the jury, find the defendant guilty of the first, second, and third counts and disagree as to the fourth count.

That thereafter the defendant moved in arrest of judgment and for a new trial, and that the verdict be set aside, each motion being made separately and each and all being made upon the ground that the verdict, as rendered and recorded as the verdict of the jury, was in law no verdict; that it was uncertain and incomplete; that each and every of said motion- was by the court denied; that to all these denials of defendant's said motion- defendant duly and properly

excepted; that thereafter the said defendant was sentenced by the court to ten years imprisonment in the State prison and to pay a fine of one thousand dollars.

That the defendant was at that time ordered into custody and is incarcerated in the prison under such verdict and judgment.

32 And petitioner has since *issued* out a writ of error in this honorable court, directed to said district court of the United States in and for the said northern district of California, and that the records and papers thereon have been transmitted to the Supreme Court of the United States, and that a certified copy is hereby presented to this honorable court.

That petitioner is advised by his counsel, Geo. E. Colwell, of the county of Napa, State of California, that the said alleged verdict is void and of no effect, and that judgment thereon is void and of no effect; that petitioner is wrongfully and unlawfully imprisoned, and that petitioner has good and lawful cause to reverse the judgment and verdict and sentence herein before the Supreme Court of the United States.

That he is further advised and believes that your honor has the power and authority to grant a writ of supersedeas and admit petitioner to bail, staying the execution further of said sentence, as such time as petitioner and plaintiff in error may be able to have his writ of error, pending in the Supreme Court of the United States, heard and determined, and in that behalf petitioner further avers that he, prior to the said indictment, resided in Shasta county, State of California, for more than twenty-five years; that he was a pioneer of that county, and during that period was a farmer and miner, and during his entire life he has never been before charged with any crime or misdemeanor; that his reputation is the community, where he has resided for more than twenty-five years, for honesty and integrity is good, and that at his said trial more than twenty of the best citizens of the community where he has resided testified to that effect.

33 That he is a man of fifty-one years of age and has always been a good and upright citizen, and avers that he is not guilty of the offenses as charged in the first three counts, upon which he was convicted, and as he is informed and believes, and upon his information and belief alleges, that he will get a new trial, and believes that upon that new trial he will be acquitted of the crimes as charged in the first three counts of said indictment, and the confining him in prison pending the hearing of his writ of error will work upon him a very grave hardship, and that he is ready and willing to give a good, sufficient, and satisfactory bond in any reasonable amount for his appearance in the case of rehearing, or in the event that the judgment is affirmed, that he will appear and render himself subject to the judgment and sentence of the court.

Petitioner humbly avers that he believes this cause is one in which bail pending an appeal should and ought in mercy and justice be allowed.

And he doth humbly and earnestly show unto and petition your honor that he may have that grace to be so admitted to bail pend-

ing the hearing of this cause upon proper, good, and sufficient surety in money, conditions, and amount to be fixed and determined as your honor may direct.

And your orator will ever pray.

A. J. SELVESTER, *Petitioner.*

GEO. E. COLWELL,
Att'y for Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

A. J. Selvester, being duly sworn, deposes and says that he
34 is A. J. Selvester, the petitioner in the above-entitled action; that he has read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

A. J. SELVESTER.

Subscribed and sworn to before me this 25 day of June, A. D. 1896.

[SEAL.]

N. E. W. SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

35 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,
vs.
A. J. SELVESTER, Defendant and Plaintiff in Error.
} Citation on Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

To H. S. Foote, Esq., attorney for the United States and United States district attorney for the northern district of California:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1896, pursuant to an order allowing a writ of error, entered in the clerk's office of the district court of the United States for the northern district of California from a judgment of conviction entered on the first day of June, A. D. 1896, in that certain action wherein The United States was plaintiff and A. J. Selvester was defendant, and show cause, if any there be, why the judgment of conviction rendered against said defendant, A. J. Selvester, as in said order allowing a writ of error mentioned, should not — granted and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 8th day of July, A. D. 1896.

WM. W. MORROW,
Judge of the District Court of the United States for the Northern District of California.

25½ Service of the within citation is hereby admitted this 25th day of June, A. D. 1896.

HENRY S. FOOTE,
United States District Attorney for the Northern District of California.

35¾ [Endorsed:] No. —. Dept. —. Supreme Court of the United States. The United States, plaintiff and defendant in error, *vs.* A. J. Selvester, defendant and plaintiff in error. Citation on writ of error. Receipt of copy of within — admitted this — day of ——, 189–. ——— ———, attorney for —. Filed July 8th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk. Geo. E. Colwell, attorney for pl'ff in error, Napa, Cal.

36 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Wednesday, the 8th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
vs.
JAMES SELVESTER. } No. 3073.

The matter of the petition of James Selvester, defendant herein, for a writ of supersedeas and an order admitting said defendant to bail pending the determination of his writ of error to the Supreme Court of the United States this day came on for hearing—Geo. E. Colwell, Esq., appearing as attorney for said defendant and H. S. Foote, Esq., U. S. attorney, appearing on behalf of the United States—and, after hearing Mr. Colwell and Mr. Foote and due consideration had thereon, it is by the court ordered that said petition be, and the same is hereby, denied.

37 UNITED STATES OF AMERICA, } ss:
Northern District of California,

The President of the United States to the marshal of the United States for the northern district of California, Greeting:

Whereas, at the Febr'y (1896) term of the district court of the United States of America for the northern district of California, held at the court-room of said court, in the city and county of San Francisco, in said district, to wit, on the 19th day of May, A. D. 1896, James Selvester was convicted of the possession, &c., of three pieces

of false, forged, & counterfeit coins of the U. S., &c., &c., committed on or about the 5th day of December, 1893, at Bieber, in the county of Shasta, and within the jurisdiction of said court, contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the said United States;

And whereas, on the 1st day of June, A. D. 1896, being a day in the special term of said court, said James Selvester was, for said offense of which he stood convicted, as aforesaid, by the judgment of said court ordered to pay a fine of $1,000 and to be imprisoned at hard labor for the term of ten (10) years, to date from June 1st, 1896, and in default of the payment of said fine to be further imprisoned until the same be paid or until he be otherwise discharged by due process of law; and it was further ordered by the court that said sentence of imprisonment be executed upon the said James Selvester, until the other or further order of the court, by imprisonment in the State prison of the State of California, at Folsom, county of Sacramento, State of California:

Now, this is to command you, the said marshal, to take and keep and safely deliver the said James Selvester into the custody of the keeper or warden or other officer in charge of said State prison forthwith.

And this is to command you, the said keeper and warden and other officers in charge of the said State prison, to receive from the United States marshal of said northern district of California the said James Selvester, convicted and sentenced as aforesaid, and him, the said James Selvester, keep and imprison at hard labor for the term of ten (10) years, to date from June 1st, 1896, and in default of the payment of said fine of $1,000 further keep and imprison said James Selvester until the said fine be paid or until he be otherwise discharged by due process of law.

Herein fail not.

Witness the Hon. Wm. W. Morrow, judge of the district [SEAL.] court of the United States for the northern district of California, and the seal thereof, at San Francisco, in the said district, on the 1st day of June, A. D. 1896.

SOUTHARD HOFFMAN,
Clerk of said District Court,
By —— ——, *Deputy Clerk.*

[Endorsed:] No. 3073. In the district court of the United States, northern district of California. The United States *vs.* James Selvester. Commitment.

(Endorsed:) Issued June 1st, 1896. Filed on return 13 July, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

The within warrant of commitment was received by me on the first day of June, 1896, and is returned executed this 11th day of July, 1896, by placing the within-named James Selvester into the custody of the warden of California State prison, at Folsom.

BARRY BALDWIN,
U. S. Marshal,
By H. M. MOFFITT, *Deputy.*

38 CALIFORNIA STATE PRISON, AT FOLSOM.

I hereby certify that Barry Baldwin, United States marshal for the northern district of California, this day delivered to the prison at Folsom James Selvester, a convict, who was sentenced on the 1st day of June, 1896, in the honorable district court of the ninth judicial district of the United States, to be imprisoned in the California State prison, at Folsom, for the term of 10 years and to pay a fine of $1,000, and to be further imprisoned until said fine is paid, for the crime of having in his possession counterfeit coin, &c.

In witness whereof I have hereunto set my hand and affixed the seal of the prison this 11th day of July, A. D. 1896.

CHARLES AULL, *Warden.*

39 UNITED STATES OF AMERICA, }
Northern District of California, } ss:

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing and hereunto-annexed thirty-eight pages, numbered from one (1) to thirty-eight (38) respectively, are a true copy of the record and of all proceedings in the cause mentioned in the annexed writ of error, and that the same constitute the return to said writ.

Seal of the U. S. District Court, Northern Dist. of California.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, in said district, this 14th day of July, A. D. 1896.

SOUTHARD HOFFMAN, *Clerk.*

Endorsed on cover: Case No. 16,610. N. California D. C. U. S. Term No., 397. A. J. Selvester, plaintiff in error, *vs.* The United States. Filed June 14th, 1897.

No. 397.

Motion to advance.

Filed Dec. 13, 1897.

Supreme Court of the United States.

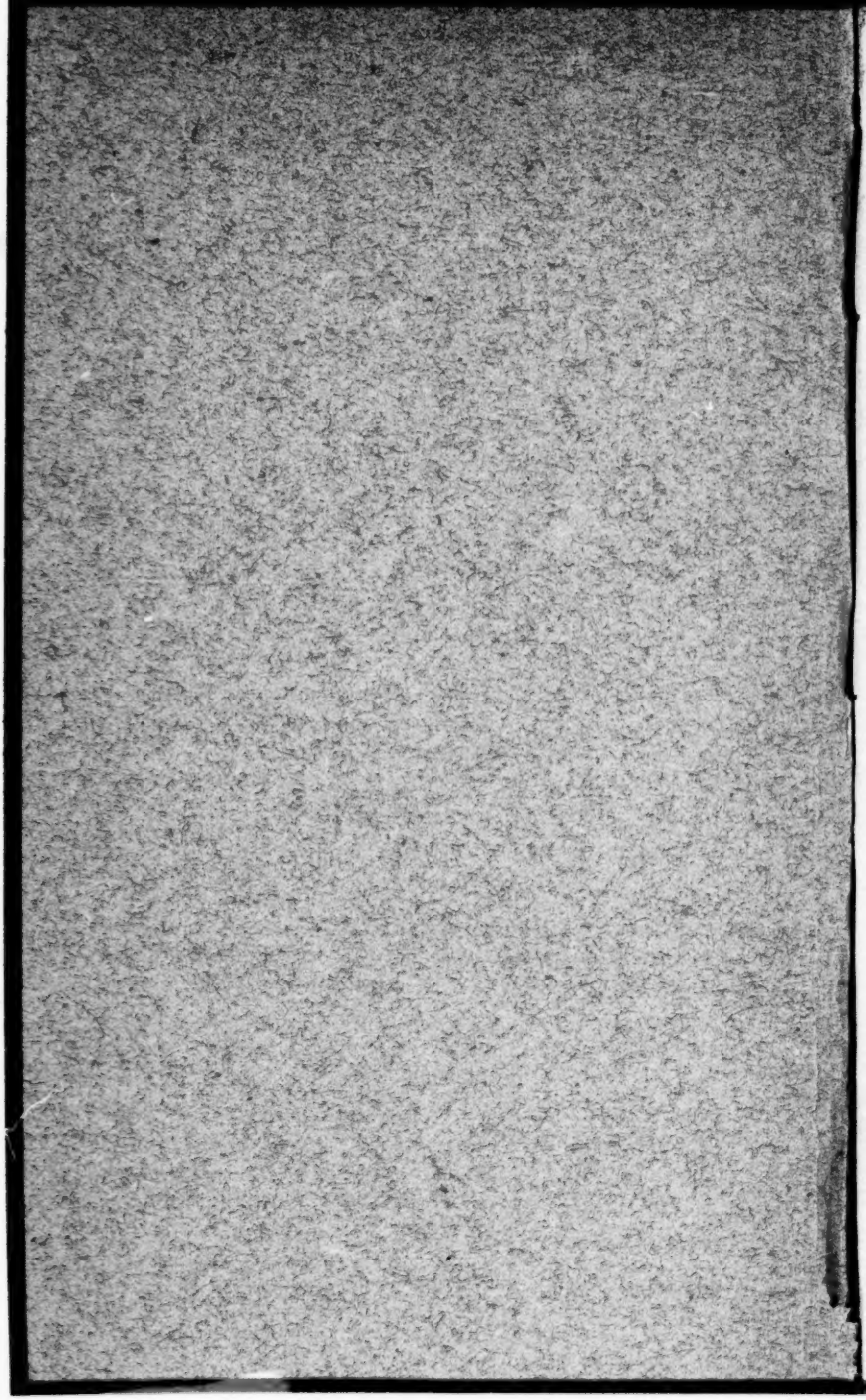
OCTOBER TERM, 1897.

A. J. SELVESTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 397.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ARTHUR ENGLISH,
Counsel.

BYRON S. ADAMS, PRINTER.



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Supreme Court of the United States.

OCTOBER TERM, 1897.

A. J. SELVESTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 397.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

STATEMENT.

On October 26, 1894, James Selvester was indicted by the United States Grand Jury at San Francisco, California, for the Northern District of California.

The indictment found by this grand jury contained four counts. The first count charged the accused with having in his possession three pieces of false, forged and counterfeit coins, of the resemblance and similitude of the fifty-cent piece of the United States. The second count, with uttering two counterfeit fifty-cent pieces. The third count, with uttering three counterfeit fifty-cent pieces. The fourth count, with making five counterfeit fifty-cent pieces.

On May 18, 1896, the accused was placed on trial to answer the indictment. After hearing the whole case, the

jury retired on May 19, 1896, to pass upon and respond to the issues submitted to it.

On the same day but subsequently, the jury returned into court and announced that it was unable to agree, but stated that it agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the court if it could return such a verdict. The court informed them they could, and the District Attorney then asked leave of the court to enter a *nolle prosequi* as to the fourth count, to which motion the counsel for the defendant objected, and upon such objection the District Attorney withdrew his said motion and the jury then, without retiring, drew up and signed the following as their verdict:

"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second and third counts of the indictment, and disagree on the fourth count of the indictment."

The court, despite defendant's objection and exception, received said verdict and caused the same to be recorded, and the jury was then discharged.

On June 1, 1896, the prisoner being in open court, on motion of the United States District Attorney, was called for sentence. The attorney for the defendant moved the court in arrest of judgment on the ground that the verdict was incomplete. This motion was by the court denied. The defendant, by his attorney, duly excepted.

The attorney for the defendant then moved to set aside the verdict on the ground that the same was incomplete. This motion was denied, and the defendant duly excepted.

Attorney for the defendant then moved for a new trial. This motion was denied, and the defendant duly excepted.

The court then adjudged that the defendant stood convicted, and sentenced him to pay a fine of one thousand dollars and be imprisoned for the term of ten years at hard

labor, and in default of the payment of said fine of a thousand dollars that he be further imprisoned until said fine be paid or until he be otherwise discharged by due process of law.

On July 8, 1896, the defendant filed a petition for a writ of error and the same was allowed and citation issued on the same date.

MOTION.

Now comes the appellant, A. J. Selvester, by his counsel Arthur English, and moves this Honorable Court to advance the above-entitled cause, the same being No. 397 on the docket and fix a day and date for argument of the same and consider the same at the earliest day possible.

And as reasons for this motion the appellant assigns that he is now in jail and has been since the 11th day of July, 1896. That he believes that he is unjustly and illegally detained and imprisoned because of the invalidity of the verdict upon which his sentence was based, and that if afforded an early hearing by this Honorable Court he can establish his right to a new trial.

Respectfully submitted,

A. J. SELVESTER,

By ARTHUR ENGLISH,

Counsel.

No. 397.

Brief of English for P. & E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Feb. 28, 1898.

A. J. SELVESTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
} No. 397.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

ARTHUR ENGLISH,
Of Counsel

BYRON S. ADAMS, PRINTER.

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A. J. SELVESTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 397.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Statement.

On October 26, 1894, James Selvester was indicted by the United States grand jury at San Francisco, California, for the northern district of California.

The indictment found by this grand jury contained four counts. The first count charged the accused with having in his possession three pieces of false, forged and counterfeit coins of the resemblance and similitude of the fifty-cent piece of the United States. The second count, with uttering two counterfeit fifty-cent pieces. The third count, with uttering three counterfeit fifty-cent pieces. The fourth count, with making five counterfeit fifty-cent pieces.

The accused pleaded not guilty to each and all of the counts of said indictment, and on May 18, 1896, was placed on trial to answer the same. After hearing the whole case,

the jury retired on May 19, 1896, to pass upon and respond to the issues submitted to it.

On the same day, but subsequently, the jury returned into Court and announced that they were unable to agree, but stated that they agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the Court if they could return such a verdict. The Court informed them they could, and the District Attorney then asked leave of the Court to enter a *nolle prosequi* as to the fourth count, to which motion the counsel for the defendant objected, and upon such objection the District Attorney withdrew his said motion and the jury then, without retiring, drew up and signed the following as their verdict:

"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second and third counts of the indictment, and disagree on the fourth count of the indictment."

The Court, despite defendant's objection and exception, received said verdict and caused the same to be recorded, and the jury was then discharged.

On June 1, 1896, the prisoner being in open court, on motion of the United States District Attorney, was called for sentence. The attorney for the defendant moved the Court, in arrest of judgment, on the ground that the verdict was incomplete. This motion was by the Court denied. The defendant, by his attorney, duly excepted.

The attorney for the defendant then moved to set aside the verdict on the ground that the same was incomplete. This motion was denied, and the defendant duly excepted.

Attorney for the defendant then moved for a new trial. This motion was denied and the defendant duly excepted.

The Court then adjudged that the defendant stood convicted, and sentenced him to pay a fine of one thousand

dollars and be imprisoned for the term of ten years at hard labor, and in default of the payment of said fine of a thousand dollars, that he be further imprisoned until said fine be paid, or until he be otherwise discharged by due process of law.

On July 8, 1896, the defendant filed a petition for a writ of error and the same was allowed and citation issued on the same date.

Assignment of Errors.

1. That the Court erred in denying defendant's motion for arrest of judgment herein.

2. That the Court erred in denying defendant's motion to set aside the verdict rendered herein.

3. That the Court erred in denying defendant's motion for a new trial.

4. That the Court erred in proceeding to sentence upon the verdict rendered herein.

Argument.

In the case under consideration the Government prepared an indictment in which was charged three different crimes in the form of four counts. Two of these counts charged the commission of the same offense under different circumstances. Each count charged Selvester with having committed an act which is made a crime by statute. Each one of these counts, except the two which charged the commission of the same offense, charged Selvester with committing, what by statute, is a distinct and separate crime. For the commission of either crime, though each is a different crime by statute, there is affixed the same penalty, to wit: A fine of not more than five thousand dollars and imprisonment at hard labor for not more than ten years. All these dif-

ferent crimes are defined and described in one and the same section of the Revised Statutes, to wit: Section 5457.

A Criminal Proceeding is Mandatory and Can Not be Deviated From in any Particular.

In a criminal case, the proceeding is one between the State and the accused, and the procedure as laid down is mandatory upon the agents of the State. A failure to comply with every step specified by law, invalidates the entire proceeding. Neither agent of the State nor the accused can legally waive any proceeding which the law requires to be done. The accused has no power to change the law of procedure by waiving any step which the law requires the agents of the State to perform. The law of criminal procedure is as unchangeable as the law of nature, except to the power which created it.

Therefore, in any criminal suit, the slightest deviation by the agents of the State or Government, who are represented in the person of the judge, prosecuting attorney, and officers of the Court, on the one hand, and the grand jury and the petit jury, which is in one sense but one jury, on the other hand, invalidates the entire proceeding, and no power lies in the Court to make good what the law declares to be void.

The distinction between a civil suit and a criminal suit is very marked. A civil suit is a controversy between two persons and being such they can waive a resort to any part of the procedure laid down by the law, or settle their differences without a court of justice if they see fit.

Though there exists this difference between criminal and civil cases, yet when before a Court

The Rules Relating to Civil and Criminal Verdicts Are Alike.

All rulings laid down in civil cases as to what is required in order to make a verdict complete and sufficient upon which to render a judgment, is applicable in criminal

cases, but the rules are usually far more strictly enforced where the life or liberty of a person is at stake, though the law does not command a more strict enforcement.

It was a principle laid down by Chief Justice Holt, 1 Salkeld, 51, that whatever at common law might be amended in civil cases, was at common law amendable in criminal cases. *E Converso*, whatever the law prohibits from being amended in civil cases, cannot be amended in criminal cases.

And further, whatever the law requires in a verdict in a civil cause, it will require in a criminal cause, as the rules are the same. (3 McLean C. C., 233; Greenleaf in Evidence, Section 65.)

ACCUSED ENTITLED TO VERDICT ON EACH CHARGE.

If the Government had prepared a separate indictment for each of the crimes it charges in the different counts under consideration, and the grand jury had returned each of these separate indictments as a true bill, the accused would have been entitled under the Constitution to a trial on each indictment and a verdict of guilty or not guilty from a legal jury. After the grand jury once returned the accusation into Court, the law gave the accused the right to a trial and a verdict of guilty or not guilty, and the agents of the Government could not deprive him of that right.

When the grand jury returned the indictment under consideration with its four separate and different charges or counts, accusing Selvester of having committed three distinct and different crimes, and one of these crimes on two occasions, the Constitution and the law conferred on him the right to the verdict or answer of a legal jury on each and every one of the counts, and until a jury passed upon each of these charges and responded by a verdict of guilty or not guilty on each, it had not performed its duty and had not rendered a legal verdict or decision.

An indictment, whether containing one or more counts, must be considered as an entire thing. It is one indictment made up of different parts, and but one jury can pass upon it at the same time, and but one verdict be rendered in response to it, yet at the same time that verdict must respond to each charge.

If there be a defect in an indictment containing several counts, and it be quashed for that defect, the whole indictment is destroyed. This demonstrates the entirety of an indictment even though it be composed of several counts.

A verdict which does not answer each charge in an indictment is no verdict at all. A jury which fails to fully answer each count in the indictment has not performed its duty, and no judgment can be founded on other than a full performance. Its action, when its verdict is incomplete, is equivalent to none at all and a nullity.

A Jury Must Respond to the Issues.

In the early English and American cases tried by a jury the rule that the answer of the jury to the issues submitted to it should be strictly responsive was very rigidly enforced, and any finding which did not respond to the issues submitted was set aside as void. This rule applied to both civil and criminal cases. (3 Salkeld, page 372; Croke Elizabeth, 133; 12 Mod., 5; 1 Vent., 27; Cro. Jac., 328; 2 Lord Raymond, 520; Cowp., 706; Dougl., 666; 1 Term Report, 239; *Id.*, 447; Graves *vs.* Morley, 3 Levinz's, 55; Rosse's Case, 3 Leon, 83; Kerr *vs.* Hartshorne, 4 Yeates, 295; 1 inst. a 227; Smith *vs.* Raymond, 1 Day, 189; Bacon's Abridgment, verdict (letter M); Broshway *vs.* Kinney, 2 Johns, 210; Van Bethuysen *vs.* De Witt, 4 Johns, 213; Patterson *vs.* U. S., 2 Wheaton, 222; Garland *vs.* Davis, 4 Howard, 132; Downey *vs.* Hicks, 14 Howard, 241.)

It is also laid down as a rule that a *venire de novo* is granted when the finding of the jury is less than the whole matter put in issue. (Cro. Jac., 31; 2 Lord Raymond, 1521, 2; 4 Barn. and Cress., 69; 6 Dowl. and Ryl., 68 S. C.; 1 Chitty Criminal Law, 646.)

After the defendant is once placed upon trial every count in the indictment becomes an issue, which it is the sworn duty of the jury to respond to with a verdict of guilty or not guilty. (American Encyclopedia of Law, Vol. 28, title Verdict, division Responsiveness, page 281, 1st Ed,; same, page 292.)

When a verdict does not include a finding upon every fact in issue it is not a verdict at all, but a nullity. (Ford *vs.* Taggart, 4th Texas, 492; Wood *vs.* McGuire's Children, 17th Ga., 361; 63 American Decisions, 246.)

And the jury must find the issue either for or against the accused. (Holmes *vs.* Wood, 6th Mass., page 1; Settle *vs.* Allison, 52 American Decisions, page 393.)

And answer the whole issue and not a part. (Kerr *vs.* Hartshorne, 4 Yeates, page 295; 1 Lord Raymond, 324.)

According to the judge in Pritchard *vs.* Hennessy (1 Gray (Mass.), 294), it was the practice for more than four hundred years in England to send out the jury when they returned a defective finding.

In Traun *vs.* Wittick, 27 Ala., 570, the Court said:

"It is laid down as an elementary rule, that a verdict is void if it find only a part of the issue. (6 Com. Dig., tit. Pleader, S. 19, and cases there cited.) It must also be certain—that is, must find the fact clear to a common intent. *Id.* 21.")

Continuing the Court said :

"The Court must not be left to infer or guess at the meaning of the jury, and to arrive at a conclusion as to the extent of their finding by argument and doubtful inference; but the facts must be found with such reasonable certainty as will enable the Court to pronounce a satisfactory judgment, definitely settling the rights of the parties."

The strictness of the English rule—that a verdict was void where the jury failed to respond to all of counts or issues—has been departed from in some of the States in criminal cases, but only where the failure to respond was not injurious to the accused. It has been held that where there are several counts in an indictment, and the jury find the defendant guilty on one or more, and make no finding on one or more of the counts, that the presumption is that the jury intended to acquit the defendant on the charge or charges which it does not respond to. These cases, however, are nowise in point in the case under consideration. In the case now before this Court the jury distinctly stated to the Court that it was unable to agree on one of the counts of the indictment. It was clearly the duty of the Court, on the jury making known this fact, to send it out again, and if it could not agree to discharge it.

AN ANSWER TO EACH CHARGE A CONSTITUTIONAL RIGHT.

When issues in the form of charges are once raised against an accused, he is entitled to an answer from the jury upon each of the charges which are made against him. To use the words of the Hon. Justice Harlan, speaking as the organ of this Court, in Hodges *vs.* Easton (106 U. S., page 112):

"It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done, was secured by the Constitution of the United States."

The correctness of this ruling is very clear, for it would be manifestly unfair to one accused of a crime, not to have a jury of his own countrymen determine and forever set at rest the truth or falsity of the charges which were made against him.

The jury which tried Selvester was sworn to try and determine the issues which were submitted to them. On their failure to do this, and their declaration that they could not do it, it was the duty of the judge to discharge them and to afford Selvester a new trial.

In Deady *vs.* U. S. (152 U. S., 539), this Court held that—

"Each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

In the above case the crime was conspiracy to defraud under section 5440, Revised Statutes, and the different counts referred to were but different transgressions of the same law, and not offenses against different laws. While it is true that "each count is in form a distinct charge of a separate offense" it is also true that it is not the whole indictment, and a jury does not respond to the indictment unless it answers each count and returns an agreed verdict upon the whole indictment, either by word or by legal presumption. By legal presumption is meant the case where the counts are not referred to, but which the law presumes are verdicts of not guilty. But the law will not carry this legal presumption to cases either where the jury refuses to make any return at all or makes a return that it disagrees on part of the indictment. In either case there is no verdict.

The law will not presume a jury intended to find not guilty on all the counts because it ignores all. But when it finds guilty on one or more and ignores one or more, the law operates and supplies a verdict in favor of the accused

on the counts not mentioned. The law never, however, operates against an accused, and if a man be acquitted on one count and the others are ignored, the law will not supply a verdict of guilty on the counts not answered. The correct procedure in such a case would be to compel the jury to respond to all the counts or discharge it, and in fact that should be the procedure in all cases where counts are not responded to.

A Jury Must Pass Upon Each Count Separately.

In Commonwealth *vs.* Carey (103 Mass., 214), the Court laid it down as a cardinal principle of criminal law, that where several offenses of the same general character and subject are charged in separate counts of the same indictment,

"The jury must pass upon each count separately, and apply to it the evidence bearing upon the defendant's guilt of the offense therein charged. And if they fail to do so, *their verdict cannot be sustained.*"

It is quite clear that where a defendant is charged with several offenses, he is entitled to the answer of his peers upon each one of the charges. This is a guarantee which is implied by the right given him to be tried by a jury.

In Commonwealth *vs.* Fitchburg Railroad (120 Mass., 372), the judge, rendering the opinion of the Court, stated (page 381) that the jury should have been instructed to return a verdict of guilty upon the count proved, if either were proved, and not guilty upon all the others. It will be thus noticed that it is laid down as a fundamental principle, by the Massachusetts courts and consistently adhered to, that a jury must respond by a verdict of either guilty or not guilty to each count in an indictment, and where they could not do so, the verdict is defective and no judgment can be pro-

nounced upon it. This principle is expressly upheld by the courts of Ohio and Nebraska.

WHERE THE JURY DISAGREE ON ONE COUNT IT IS NO VERDICT.

In the case of George Hurley *vs.* State of Ohio (6 Ohio, page 403), the jury returned a verdict that they acquitted Hurley on the first count and disagreed on the other two. The judge refused to enter the verdict, continued the prosecution, and discharged the jury. At the next term Hurley was again placed on trial and his attorney filed a plea in bar which was overruled. On the second trial, Hurley was acquitted on the first two counts and convicted on the third count. On writ of error the Supreme Court held that the judge in the first trial did not err in refusing the verdict of the jury, as it was no verdict at all, but a nullity. In reaching this conclusion the Court, in the last paragraph of page 403, said:

"A verdict in either a civil or criminal case must be considered an entire thing. It must respond to the whole declaration, and to every count in the indictment, or the court cannot legally receive it as the verdict of the jury. * * * In this case the record shows that the jury could not agree on a verdict on the last two counts in the indictment; and having agreed on the first was no reason why the verdict should have been received. It was in law no verdict, and the court did not err in rejecting it altogether."

The above case is directly in point, and the attention of the Court is particularly called to the same.

See, also, Fox *vs.* State, 34 Ohio State, 377.
Hanley *vs.* Levin, 5 Ohio, 227.
Jackson *vs.* State, 39 Ohio State, 37.

In Hurley *vs.* State of Ohio, *supra*, the indictment against Hurley charged three different degrees of the same crime.

The counts charged respectively murder in the first degree, murder in the second degree, and manslaughter.

The jury acquitted Hurley of murder in the first degree, and disagreed as to whether he was guilty or not guilty of murder in the second degree, or guilty or not guilty of manslaughter.

The Supreme Court held this a bad verdict, because the jury did not respond to every count in the indictment. This was but upholding the doctrine that an accused is always entitled to a response to every charge made against him in an indictment, and unless a jury do this its verdict is void.

It will be noticed that the crime Hurley was charged with was killing, and the different counts were but charges of a different degree of that same killing.

In the case of Selvester, three counts each charged a different offense, and not the same offense on three occasions, and not different degrees of the same offense.

It is scarcely probable, that if the jury had acquitted Selvester on the first three counts and disagreed on the fourth, that the judge would have discharged him. He would not have had authority so to do, but would have been compelled, like the Ohio judge in Hurley's case, to have continued the prosecution and discharged the jury.

In Wilson *vs.* State of Ohio (20 Ohio, page 26), the Court said:

"But certain it is if the prosecutor be permitted to charge the prisoner with diverse crimes, subject to different shades of penalty, all in the same indictment, the plea of not guilty by the accused, puts in issue the truth of *all the charges*, and we are of opinion that the finding of the jury should be equally extensive."

See also Williams *vs.* State, 6 Neb., 343.
Casey *vs.* State, 20 Neb., 159.
Muller *vs.* Jewell, 66 Cal., 216.

A NOLLE PROSEQUI CANNOT BE ENTERED DURING TRIAL.

In the case under consideration, the District Attorney offered to enter a *nolle prosequi* as to the fourth count upon which the jury disagreed. This was objected to by the defendant, and the *nolle prosequi* was not entered.

It is a principle of criminal procedure, that a *nolle prosequi* cannot be entered during the trial. In Commonwealth *vs.* Scott, 121 Mass., page 33, the Court said:

"Before the jury is empannelled, or after conviction, a *nolle prosequi* may be entered without the assent of the defendant; but not during the trial. It is then the right of the defendant to have the jury pass upon his case, and he is entitled to a verdict which will be a bar to another indictment for the same offense, and a *nolle prosequi* is not a bar. At that stage of the proceedings his consent is necessary. (Commonwealth *vs.* Tuck, 20 Pick., 356, 365. Same *vs.* Kimball, 7 Gray. 328.")

The ruling in this case is cited with approval in Commonwealth *vs.* Adams, 127 Mass., page 15.

As stated by the Honorable Court above quoted, Selvester, in the case under consideration, was entitled to a verdict on the fourth count which would be a bar to another indictment for the same offense, but the response of the jury that it disagreed on the fourth count, is not a verdict which will bar Selvester from being again indicted or tried on that allegation.

THE VERDICT BEING INCOMPLETE WAS A NULLITY.

The indictment found against Selvester, though containing four counts, constituted but one indictment and could only be submitted to the jury as an entirety. A separate trial could not be had on each count, and therefore, to make a perfect trial on this indictment, the jury had to render a unanimous response to the indictment as a whole, or a com-

plete response to each portion of it. The answer of the jury that it found the accused guilty of three parts of the indictment, but disagreed as to whether he was guilty of the fourth part, was not an answer to the indictment, and not being a complete and unanimous answer to the indictment, was not a verdict at all.

Without a perfect verdict the judge was without jurisdiction to impose sentence. Until a perfect verdict is rendered to the Court by the jury, the former cannot impose a sentence. The law does not empower a judge to impose a penalty upon an accused until the jury has returned a full answer to the issue or issues submitted to it.

The ruling by the judge that the accused stood convicted, was not warranted by the answer of the jury. The Court could not supply the defective finding. (Bemus *vs.* Beekman, 3 Wend., 667.)

If an accused can be sentenced upon a finding where the jury declare they disagree as to part of the indictment, he could be sentenced where they disagreed on all the parts. If the judge can supply the defects in a part of the finding, he can supply it in all. A legal verdict is a complete answer to the indictment as a whole, and not to a portion of it.

It is true, as heretofore stated, that it has been held that where a jury finds an accused guilty on one or more counts, and does not mention the other counts, the verdict is good, but this is because the law always supplies the answer to the unanswered counts in favor of a defendant. This because the law presumes that when the jury made an express finding against the accused on certain counts and silence on the others, that it was their intention to acquit on the counts not mentioned.

But, as hereinbefore stated, such a presumption could not be invoked in favor of guilt. If a jury expressly acquitted

an accused on two counts and did not mention the other two, the law would not presume it intended to find him guilty on the two not mentioned. Every presumption in law is in favor of innocence.

A Disagreement is not a Response.

But in the case under consideration the jury left nothing to presumption. It expressly declared that it disagreed upon the fourth count. A disagreement is not a response, but a notice to the court that the jury can not respond because a unanimous answer can not be given. Such a declaration by the jury prevented the judge from acquiring jurisdiction to pronounce sentence. When once the issues have been submitted to a jury to determine, a judge's jurisdiction to impose judgment or discharge a prisoner is not acquired until the jury has rendered a complete answer to the indictment. If the jury fail to make answer, the judge can neither pronounce sentence nor discharge the prisoner, but only continue the prosecution and order his return to custody. The duty of a judge is to see that an accused is not "deprived of life, liberty, or property, without due process of law." It is also his duty, when a jury acquits an accused, to discharge him from custody, and when it convicts to pronounce the sentence of the law. But no judge can make an imperfect verdict perfect so he can pronounce judgment upon it, any more than he could indict a prisoner. He can not act as a jury any more than he could act as a grand jury. (Bemus *vs.* Beekman, 3 Wend., 667.)

The Accused Was Deprived of a Constitutional Right.

The Constitution of the United States guarantees that no person shall be deprived of life, liberty, or property without due process of law, and the case under consideration being

tried in a Federal court, that court is bound by that provision. In the case under consideration, the accused was entitled to a conviction or an acquittal upon every charge which the grand jury made against him. He was entitled to an answer from a jury of twelve men upon each one of the charges alleged in the indictment. Unless he received such an answer, after having been placed upon trial, he was deprived of a right which Justice Harlan, in the case of Hodges *vs.* Easton, heretofore cited, says is secured by the Constitution of the United States. Unless he receive a response from the jury to whom the charges against him are submitted, he is tried without due process of law. Every person who is charged in an indictment with an offense against the United States is entitled to a verdict which will forever set at rest the truth or falsity of the allegations made against him by the grand jury. No trial is a fair one which leaves undetermined a material allegation against the accused. It is manifestly unfair to an accused person to leave hanging over him an undetermined charge without his consent, and no verdict is complete which leaves a charge in that condition.

Conclusion.

From what has been said, it is respectfully submitted to this Honorable Court that the plaintiff in error, Selvester, is entitled to a new trial, as the proceeding had in the District Court was a nullity and the judge was without jurisdiction to render judgment upon the return of the jury to the issues submitted to it. The response of the jury was not a verdict upon which a judgment could be rendered by the Court, and the Court could not supply a defect in that response so as to make it a legal verdict.

ARTHUR ENGLISH,
Of Counsel

No. 397.

Brief of Atty. Gen. [illegible]
for United States.

Filed Mar. 9, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

A. J. SELVESTER, PLAINTIFF IN ERROR,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

JAS. E. BOYD,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

A. J. SELVESTER, PLAINTIFF IN ERROR,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

James Selvester, the plaintiff in error, was tried and convicted in the district court of the United States for the northern district of California at May term, 1896, and was sentenced to pay a fine of $1,000 and to be imprisoned at hard labor for the term of ten years. Selvester was tried upon a bill of indictment containing four counts, the indictment being as follows (Rec., pp. 2–4), omitting formal parts:

> (1st count.) * * * James Selvester * * * did then and there unlawfully, willfully, knowingly,

and feloniously, and with intent then and there to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, have in his, the said James Selvester's, possession the following three pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.

(2d count.) * * * James Selvester * * * did then and there unlawfully, willfully, knowingly, and feloniously, and with intent to defraud one Ruben Baker, pass, utter, publish, and sell as true to the said Ruben Baker the following two pieces of false, forged, and counterfeit coins of metal, to wit, two pieces of false, forged, and counterfeit coins of metal, each one of which said two pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination of and known as a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.

(3d count.) * * * James Selvester * * * did, then and there, unlawfully, willfully, knowingly, and feloniously, and with intent to defraud one Wolf Rudee, pass, utter, publish, and sell as true to the said Wolf Rudee the following three certain pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said three pieces of false, forged, and counterfeit coins of metal was then and there in

> the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.
>
> (4th count.) * * * James Selvester * * * did then and there feloniously, knowingly, and unlawfully falsely make, forge, and counterfeit five certain pieces of metal in the resemblance and similitude of silver coins of the United States called half dollars or fifty-cent pieces, which had been coined at a mint of the United States, etc.

The jury, after having the case under consideration for several hours, came into court and rendered the following written verdict (Rec., p. 10):

> We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second, and third counts of the indictment and disagree on the fourth count of the indictment.

It was to this verdict that the plaintiff in error excepted, and upon the refusal of the court to arrest judgment, to set aside the verdict, or to grant a new trial, the assignments of error are based. The only question for the court here is, Whether or not the verdict as rendered by the jury, under the circumstances, is sufficient in law?

ARGUMENT.

It will be observed (Rec., p. 10) that the jury, after being charged by the court, retired for deliberation upon the case at 12.34 p. m. Subsequently, at 2.42 p. m., the jury returned into court and asked for and received further instructions, and again returned into court at 3.45

p. m. and asked for and received further instructions from the court, and, upon receiving the desired instruction, rendered the verdict in writing. By an examination of the record (p. 16) the court will see the further proceedings which were had.

When the jury came into court the second time, they announced that they were unable to agree, but stated that they had agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the court if they could return such a verdict. The court informed them that they could, and the district attorney then asked leave of the court to enter a nolle prosequi as to the fourth count, to which motion the counsel for the defendant objected, and upon such objection the district attorney withdrew his said motion, and the jury then, without retiring, drew up and signed the verdict above set forth. The defendant then and there objected to the reception of the verdict on the ground that it was incomplete and not fully responsive to the issues, and, upon the court's overruling the objection, excepted. The assignments of error are as follows (p. 17):

> First, that the court erred in denying defendant's motion for arrest of judgment herein.
>
> Second, that the court erred in denying the defendant's motion to set aside the verdict rendered herein.
>
> Third, that the court erred in denying the defendant's motion for a new trial.
>
> Fourth, that the court erred in proceeding to sentence upon the verdict rendered herein.

Though there are four several assignments of error, they are to the same end, namely, based upon the objec-

tion to the reception of the verdict as rendered by the jury and the pronouncing of judgment thereon by the court.

The indictment in substance in the first count charges the possession of counterfeit coin with intent to defraud; in the second count charges the uttering of counterfeit coin with intent to defraud one Ruben Baker; in the third count charges the uttering of counterfeit coin with intent to defraud one Wolf Rudee; and in the fourth count charges the actual making, forging, and counterfeiting of the coin by Selvester.

Every one of the several counts charges a distinct and separate offense, upon either of which the defendant could have been prosecuted in a separate bill, and which would not have been joined in this bill except for the provisions of section 1024 of the Revised Statutes, the transactions constituting the same class of crimes alleged to have been committed by the same person, and being joined in one bill in separate counts, as required by the said section.

The facts in relation to the bill of indictment, the trial, and the rendition of the verdict are presented in this brief in order that the court may, without the inconvenience of resorting to the record, understand the point involved. Was the verdict sufficient in law to authorize the court to proceed to judgment? That is the only question.

It would seem that the plaintiff in error is dissatisfied because the jury found him guilty of only three several criminal offenses, instead of going a step further and convicting him of four.

In *Deady* v. *United States*, 152 U. S., 539, referred to in brief of plaintiff in error, the position taken in behalf of the United States here is sustained; that is, "each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in the other counts." In other words, whatever may have been the action upon one of the several counts in the bill of indictment in this case, it did not affect the other counts. Each one of the counts in the bill under consideration raised a separate and distinct issue standing alone for the jury to pass upon in the light of the testimony pertaining to it. For example, the prosecution may have introduced testimony only tending to show that Selvester had counterfeit coin in his possession knowingly and with intent to defraud. This would authorize the jury, if such testimony was convincing, to convict upon the first count, but it would not authorize a conviction upon the second, third, or fourth counts. Further, after showing that Selvester had knowingly had counterfeit coin in his possession, the prosecution could proceed a step and prove that he passed it to Baker. This would authorize a conviction upon the second count, but not upon the third or fourth counts. Then evidence that Selvester knowingly and with fraudulent intent passed counterfeit coin to Rudee would warrant the jury in convicting him on the third count; but testimony to this extent upon the first, second, and third counts would not authorize the jury to convict upon the fourth count, for before a conviction could be had upon that count the pros-

cution must prove that Selvester actually made the counterfeit money himself.

Why the district attorney withdrew his entry of a nolle prosequi as to the fourth count is not explained, for undoubtedly he had a right to make such an entry (*Commonwealth* v. *Stedman*, 12 Met. (Mass.), 444), or he could have asked the court to direct that the jury return a verdict of not guilty upon the fourth count, and the court could have taken this course. But I will not discuss what might have been done, as the court here will take into consideration only that which was done.

The proposition laid down by the plaintiff in error in effect is this: That a man must escape conviction and punishment for three several crimes of which a jury says he is guilty, simply because the jury fails to agree that he is proven to be guilty of a fourth offense. No one will contend that every one of the four counts in the indictment does not allege a separate and distinct offense upon which Selvester might have been tried without involving the other counts. "A conviction may be on one of several counts, each charging a distinct offense, with a discharge upon the others, either in express terms, or by silence, which is regarded as a constructive acquittal." A. & E. Encycl., vol. 28, 375.)

In *Commonwealth* v. *Stedman* (12 Met. (Mass.), 444), cited above, the defendant was tried on a bill containing six counts. The jury returned a verdict that the defendant was guilty of the charge contained in the third count and stated that they had not agreed as to the other counts. This verdict was sustained by the supreme judicial court

of Massachusetts, and it is also decided in the same case that the Commonwealth's attorney had a right to enter a nolle prosequi as to the counts in which the jury could not agree to a verdict.

The counsel for the defendant in that case undertook to maintain substantially the same position as did Selvester in this case, namely, that the defendant had a right to a verdict on all the counts; that the district attorney could not enter a nolle prosequi as to the counts upon which the jury failed to agree; that a verdict on a part of the complaint, leaving the rest unsettled, can not be received without the defendant's consent. The contention of the Commonwealth's attorney, however, was that the court might well have received a verdict on one count without a nolle prosequi, although the jury did not agree as to the others, and he cited in support of this position *Commonwealth* v. *Wood*, 12 Mass., 312; *Inhabitants of Sutton* v. *Inhabitants of Dana*, 1 Met. (Mass.), 383; *French* v. *Hanchett*, 12 Pick., 15; *State* v. *Woodruff*, 2 Day, 504.

The rule, as I understand it, is that where a verdict is rendered on less than the whole number of counts the verdict should specify the counts on which it is rendered. The jury in this case, in their written verdict, found, specifically, that the defendant was guilty upon the first, second, and third counts of the indictment. (*Day* v. *People*, 76 Ill., 380.) A verdict may be found by naming on what counts the defendant is guilty. (*Nabors* v. *State*, 6 Ala., 200.)

Where a jury find a defendant guilty on one count, and say nothing in their verdict concerning other counts,

it will be equivalent to an acquittal as to them. (*State* v. *Taylor*, 84 N. C., 773.) This authority is in line with the citation from the A. and E. Encyclopædia of Law above. Upon an indictment containing nine counts for embezzlement of different grades, and other counts for larceny, a verdict of "guilty of embezzlement" is equivalent to an acquittal of the larcenies charged and a bar to any subsequent prosecution. (*Guenther* v. *People*, 24 N. Y., 100.)

In the case here, Selvester was found guilty of three of the four offenses charged against him, by the rendition of a verdict giving the numbers of the counts upon which he was convicted. Now, if the result of a disagreement as to the fourth count amounts to an acquittal, then Selvester has no cause for complaint, for the failure to agree was to his benefit.

Where different degrees of offense are charged in the different counts of an indictment, it is proper practice for the verdict (if against the defendant) to state under which count he is found guilty. (*Carter* v. *State*, 20 Wis., 647.) But I do not regard it as necessary to discuss the question involved in this case further.

I rest the case for the Government upon the position that the verdict as returned by the jury and received by the court is valid, and is not only not subject to objection, but is in accordance with the established rules of law and practice. If an effort should be made to put Selvester again upon trial upon the charge in the fourth count, it will then be time to raise the question as to the effect of the proceedings so far had in relation thereto. I assume

that in case of a second trial upon the fourth count the counsel for Selvester will be quick to make the point of former acquittal, or at least twice in jeopardy.

JAS. E. BOYD,
Assistant Attorney-General.

SELVESTER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 397. Argued March 14, 1898. — Decided April 25, 1898.

Plaintiff in error was indicted for alleged violations of Rev. Stat. § 5457 The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second, an illegal passing and uttering of two such pieces; the third, an unlawful passing and uttering of three pieces of like nature; and the fourth the counterfeiting of five like coins. After the jury had retired, they returned into court and stated, that, whilst they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be, whereupon they rendered a verdict that they found the prisoner guilty on the first, second and third counts of the indictment, and that they disagreed on the fourth count, which verdict was received, and the jury discharged. *Held*, that there was no error in this.

Latham v. *The Queen*, 8 B. & S. 635, cited, quoted from, and approved as to the point that, "in a criminal case, where each count is, as it were, a separate indictment, one count not having been disposed of no more affects the proceedings with error than if there were two indictments."

THE plaintiff in error was indicted for alleged violations of section 5457 of the Revised Statutes. The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second, an illegal passing and uttering of two such pieces; the third, an unlawful passing and uttering of three pieces of like nature, and the fourth, the counterfeiting of five like coins. The case came on for trial, and, after the jury had retired, they returned into court and stated that, whilst they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be. The District Attorney thereupon asked leave to enter a *nolle prosequi* as to the fourth count, but, upon objection by the accused, the motion was withdrawn, and the jury rendered the following verdict:

Opinion of the Court.

"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second and third counts of the indictment, and disagree on the fourth count of the indictment."

Despite objection and exception by the accused, the court received this verdict and discharged the jury.

By motions in arrest of judgment, to set aside the verdict, and for a new trial, the defendant asserted that the verdict was a nullity, because "insufficient, incomplete and uncertain." Exceptions were duly noted to the overruling of these several motions, and the court having imposed sentence a writ of error was allowed.

Mr. Arthur English for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

Mr. Justice White, after stating the case, delivered the opinion of the court.

The assignments of error challenge the sufficiency of the verdict to support the judgment which was entered thereon. The claim is that as the verdict expressed the agreement of the jury as to the guilt of the accused as to the distinct crimes charged in three of the counts, and stated a disagreement as to the distinct crime covered by the fourth count, the verdict was not responsive to the whole indictment, and was void. That is to say, the proposition is that the verdict of guilty as to the separate offences covered by the three first counts was in legal intendment no verdict at all, because the jury stated their inability to agree as to the fourth count, covering a different offence from those embraced in the other counts.

Reduced to its ultimate analysis, the claim amounts to this: That an indictment, although consisting of several counts, each for a distinct offence, is in law an indivisible unit, must be treated as an entirety by the jury in making up their verdict, and such verdict in order to be valid must finally pass upon and dispose of all the accusations contained in the in-

dictment. In effect it is claimed that where an indictment consists of several counts, repeated trials must be had until there is an agreement either for acquittal or conviction as to each and every count contained in the indictment. It needs but a mere statement of the proposition to demonstrate that it in reason rests necessarily on the premise just stated. That this is its essential postulate is conclusively shown by the authorities which are cited to sustain it. They are: *Hurley* v. *State*, 6 Ohio, 399; *Wilson* v. *State*, 20 Ohio, 26, 31; *Williams* v. *State*, 6 Nebraska, 334; *Casey* v. *State*, 20 Nebraska, 138, and *Muller* v. *Jewell*, 66 California, 216.

In the *Hurley case*, upon the assumption that the same rules, as respects the sufficiency of verdicts, governed in criminal as in civil cases, the Supreme Court of Ohio held that a trial court acted properly in refusing to enter a verdict which found the defendant not guilty on one count of an indictment, and stated their inability to agree as to other counts; and further held that no error was committed in discharging the jury and again putting the accused upon trial.

In the *Wilson case*, the opinion in the *Hurley case* was criticised, but it was held to be "prudent," where in one indictment distinct offences were charged in separate counts, especially when these offences might subject the accused to different degrees of punishment, to require the jury in their finding, in the absence of a general verdict, to affirm or negative each charge. In consequence of this view the court reversed, because the verdict had found the defendant guilty as charged in one series of counts in the indictment, but had omitted any reference whatever to his guilt or innocence as to certain other offences charged in another series of counts. The rule thus applied was declared to be necessary because of a possible doubt as to whether a defendant might not be subject to further prosecution for an offence not passed upon by a jury in a verdict under an indictment consisting of several counts.

The Nebraska cases followed the ruling in the *Wilson case*, mainly, however, because the Ohio decision was regarded as a construction of a statute, existing in Ohio, and which had been adopted into the Nebraska Code.

The California case relied upon may be dismissed from view, as it related to a verdict in a civil cause.

In passing, we note that the doctrine that a verdict in a criminal case must respond to every count in an indictment in order to warrant a judgment thereon, as stated in the Ohio cases just referred to, seems to be no longer maintained in that State. *Jackson* v. *State*, 39 Ohio St. 37. In the *Jackson case* the issues presented were as follows: The trial court had refused to receive a verdict on an indictment containing several counts for distinct offences, which found the defendant "guilty as charged in the first count of the indictment." The jury thereupon after further deliberation returned a general verdict of guilty. The Supreme Court of the State of Ohio, in considering an exception taken to the entry of the general verdict, said: "The objection is untenable. The prisoner might have been sentenced under the first verdict, for the count on which it was based was sufficient. (Whar. Crim. Pl. and Pr. sec. 740.) But the proper course was to endeavor to obtain a verdict responding to both counts, and that course was pursued."

Whatever may be the present rule in Ohio, it is manifest from the foregoing brief analysis of the cases cited by the plaintiff in error to sustain the contentions upon which reliance is placed, that they rest upon the theory that, even although the offences charged in the several counts of an indictment be distinct and separate crimes, such a solidarity is created between them by charging them in several counts of one indictment as to render void any verdict which does not specifically and affirmatively respond to each and every count. But this proposition, whatever may be the support found for it in early cases, is not sound in reason, and is negatived by the decisions of this court and the opinion of text writers, that is to say, it is refuted by the conclusive weight of authority.

The erroneous theory as to the indivisible union presumed to arise from charging distinct offences in separate counts of one indictment, applied in the cases referred to and in some other early American cases, took its origin from the case of

Rex v. *Hayes*, (1727) 2 Ld. Raym. 1518. (See observations in the opinion in *State* v. *Hill*, 30 Wisconsin, 421.) But it has been held in England that that case did not justify the view which had been sometimes taken of it, *Latham* v. *The Queen*, 5 B. & S. 635, and that it was a mistake to apply to the several counts of distinct offences in one indictment the rule which obtains as to verdicts in civil cases. In the course of his opinion, in the case just cited, Mr. Justice Blackburn said (p. 642):

"Then it is said we are concluded by authority. There is only one case which has the least bearing on the question, namely, *Rex* v. *Hayes*, 2 Ld. Raym. 1518. In that case the indictment contained three counts, and a special verdict was returned, finding the prisoners guilty on two of them, but said nothing on the third, and the question was whether judgment could be given against them as guilty on the whole. The court held, that as the jury had virtually found, and the facts showed, the prisoners not guilty on the third count, the record established that they were guilty on two counts, and not on the third. The counsel who argued that case for the defendants referred to authorities to show that where a verdict finds but a portion of an issue, or only one of several issues, it is bad and ground for a *venire de novo*; but the court did not determine that point at all — there was no occasion to decide that no verdict being given on one count vitiates a verdict on another count which is good. In civil cases there is only one process against the defendant, and therefore if a new trial is granted on one part of the case it is granted on the whole. But in a criminal case, where each count is as it were a separate indictment, one count not having been disposed of no more affects the proceedings with error than if there were two indictments. In *O'Connell* v. *The Queen*, 11 Cl. & F. 155, which has been referred to, Parke, B., says pp. 296–7: 'So in respect of those counts on which the jury have acted incorrectly, by finding persons guilty of two offences, (on a count charging only one,) if the Crown did not obviate the objection, by entering a *nolle prosequi* as to one of the offences, *Rex* v. *Hempstead*, R. & R.

C. C. 341, and so in effect removing that from the indictment, the court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendants should on the face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.' That is exactly what I say here. Each count is in fact and theory a separate indictment, and no authority has been produced to show that we ought to defeat the ends of justice by such a technical error as this."

And the rule in England thus clearly announced is generally applied in the American cases. Whar. Crim. Pl. and Pr. § 740; 1 Bishop New Crim. Proc. § 1011. Indeed, the doctrine, as settled by repeated adjudications of this court, is in entire harmony with the English rule as announced in the *Latham case*. In *Claassen's case*, 142 U. S. 140, it was held that where a jury found an accused guilty on some counts of an indictment, and the trial judge imposed a general sentence, which did not exceed the punishment authorized by law to be inflicted for a single offence, it was immaterial whether some of the counts upon which conviction was had were bad, as the judgment was valid if only one of the counts was legally sufficient. In *Dealy* v. *United States*, 152 U. S. 539, it was held that the reception of a verdict on an indictment containing numerous counts was valid, although the verdict which set out an affirmative finding as to all but one count was silent as to that count. The discharge of the jury under such circumstances was conceded to have been proper, and it was observed (p. 542) as to the count upon which the verdict was silent, that such silence "was doubtless equivalent to a verdict of not guilty as to that count." In *Ballew* v. *United States*, 160 U. S. 187, it was found that a judgment entered upon a general verdict of guilty on an indictment consisting of several counts was erroneous as respects one of the counts alone, and for this cause the judgment was not reversed *in toto*, but was only set aside as to the count in regard to which error had been committed, and the case was remanded to the

trial court for sentence on the count as to which no error was found to have arisen, and for further proceedings as to the other count. In *Putnam* v. *United States*, 162 U. S. 687, where distinct sentences of concurrent imprisonment had been imposed under separate counts of an indictment, reversible error having been found to exist as to one of the counts only, the judgment was affirmed as to the count where there was no error and was reversed as to the other, and the cause was remanded for further proceedings with respect to the count as to which error had been committed.

These rulings are absolutely in conflict with the proposition upon which the plaintiff in error relies, and conclusively demonstrate its unsoundness. True, it is claimed that there is a distinction between the doctrine announced in these cases and the proposition here relied on. Thus, it is urged that in the *Claassen case* there was no question presented of a failure of the verdict to affirmatively respond to all the counts in the indictment, but that the sole issue was, where the verdict did respond to all the counts and thereafter some of the counts were found to be bad, whether the verdict and sentence, which did not exceed the punishment imposed by law for the offence specified in the good counts, would be held to relate alone to the good counts, and be, therefore, not subject to reversal. Whilst it is true that the claimed distinction between the facts in the *Claassen case* and those in this exists, it is one, however, which in no way distinguishes the two cases, in so far as the legal principle is concerned by which they are to be determined. This is at once made apparent by considering that if the charging of distinct offences in several counts in one indictment so unified the various offences that action on all of them was necessary to action on any one, the conclusion reached in the *Claassen case* was erroneous. The necessary effect of the decision in that case was to establish that, although distinct offences were charged in separate counts in one indictment, they nevertheless retained their separate character to such an extent that error or failure as to one had no essential influence upon the other. It is also asserted that the ruling in *Dealy's case* does not control the question

here raised. There, on an indictment charging distinct offences in several counts, the jury returned a verdict of guilty as to certain of the counts and were silent as to the others. The maintaining of this verdict, it is urged, did not import the right of a jury to agree to convict as to some counts and disagree as to others, since the court in that case imputed the verdict to all the counts, and, therefore, treated it as affirmatively responsive to all. That is, the argument by which alone it is possible to distinguish this case from the *Dealy case* must rest on the extreme and unsound assertion that in that case, although the record plainly disclosed that the jury had found only as to certain counts, nevertheless the court, as a matter of fact, held that the jury had found as to all. The statement in the opinion in the *Dealy case* to which we have already referred and cited, that the silence of the verdict as to a particular count "was equivalent to a verdict of not guilty as to that count," when properly understood, does not lend itself to the construction which the argument seeks to place upon it. The contention arises from a failure to observe the difference between discharging a jury on mere silence on their part as to the guilt or innocence of an accused as to a particular count, and doing so only after a formal disagreement, and its entry of record. Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the *Dealy case*, the effect of such discharge is "equivalent to acquittal," because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent. But such obviously is not the case, where a jury have not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offence as to which the jury has disagreed and on account of which it has been regularly discharged, would not constitute second jeopardy. The error in the convic-

tion may additionally be shown by presupposing that each crime charged in several counts of one indictment, instead of being included in one, had been prosecuted by way of separate indictments as to each. Under these conditions, if a charge contained in any one of the indictments had been submitted to the jury, and the court had after such submission, and without verdict, undertaken of its own motion, over objection, to discharge the jury, it is elementary that such discharge would be equivalent to an acquittal of the particular charge for which the accused was tried, since it would bar a subsequent prosecution. But if, on the other hand, after the case had been submitted to the jury, they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution. This distinction was illustrated by the rulings in the cases of *Putnam* and *Ballew*, *supra*. In those cases, as the error found to exist as to the particular counts which caused the reversal, prevented the trial as to these counts from constituting legal jeopardy, the case as to such counts was remanded for further proceedings thereunder, although the conviction as to the counts in which there was no error was maintained.

Affirmed.

Mr. Justice Gray, Mr. Justice Brown and Mr. Justice Shiras concurred in part, as follows:

We concur in the judgment of affirmance, and upon this short ground: The indictment contained four counts. The defendant pleaded not guilty to the whole indictment, and thereby joined issue on each and all of the counts; and the jury might find the defendant guilty upon all or any of them. The jury did return a verdict of guilty upon each of the first three counts, and disagreed as to the fourth count. The jury thus answered the whole of the issue presented by the plea to each of the first three counts, and failed to answer the issue presented by the plea to the fourth count. Their failure to return a verdict on the fourth count did not affect the validity

of the verdict returned on the other three counts, or the liability of the defendant to be sentenced on that verdict. The defendant was sentenced upon those counts only upon which he had been convicted by the jury. There is no error, therefore, in the judgment rendered upon the verdict.

But in so much of the opinion of the court, as suggests that the plaintiff in error may be hereafter tried, convicted and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. Upon principle, on one indictment and against one defendant there can be but one judgment and sentence, and that at one time, and for the offence or offences of which he has been convicted; and a sentence, upon the counts on which he has been convicted by the jury, definitely and conclusively disposes of the whole indictment, operates as an acquittal upon, or a discontinuance of, any count on which the jury have failed to agree, and makes any further proceedings against him on that count impossible. No case has been found, in which, after a conviction and sentence, remaining unreversed, on some of the counts in an indictment, a second sentence, upon a subsequent trial and conviction on another count in the same indictment, has been affirmed by a court of error.

In *Ballew* v. *United States*, 160 U. S. 187, 203, and in *Putnam* v. *United States*, 162 U. S. 687, 715, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count, the order of reversal did not direct a new trial on the latter count, but was guardedly framed in general terms "for such proceedings with reference to that count as may be in conformity to law;" and under such an order it would be open to the defendant, if set at the bar to be tried again on that count, to plead the previous verdict and sentence in bar of the prosecution.